State of Michigan
In The
Supreme Court

APPEAL FROM THE MICHIGAN COURT OF APPEALS

ANILA MUCI,

Plaintiff-Appellee, Supreme Court No. 129388

v

STATE FARM MUTUAL INSURANCE COMPANY,

Defendant-Appellant.

Court of Appeals No: 251438
Wayne County Circuit Court No: 03-304534-NF

129388
Suppl

DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF

ORAL ARGUMENT REQUESTED

PROOF OF SERVICE

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STATEMENT OF QUESTIONS PRESENTED

I.A. IN THE CONTEXT OF FIRST-PARTY NO-FAULT LITIGATION, DOES §3151 OF THE NO-FAULT ACT CONFLICT WITH MCR 2.311(A) BECAUSE THE LATTER IMPOSES A PRECONDITION TO THE UNQUALIFIED RIGHT CONFERRED BY THE STATUTE, AND ALSO MANDATES THAT THE COURT DICTATE THE SCOPE AND CIRCUMSTANCES OF THE EXAMINATION?

The trial court answered, "No".

The Court of Appeals answered, "No".

Plaintiff-Appellee contends that the answer should be, "No".

Defendant-Appellant contends that the answer should be, "Yes".

I.B. IS DEFENDANT'S RIGHT TO REQUIRE PLAINTIFF TO UNDERGO AN EXAMINATION CONTROLLED BY MCL 500.3151, BECAUSE MCR 2.311(A) CONTRAVENES THE PUBLIC POLICY DECLARED IN THE STATUTE?

The trial court answered, "No".

The Court of Appeals answered, "No".

Plaintiff-Appellee contends that the answer should be, "No".

Defendant-Appellant contends that the answer should be, "Yes".

I.C. IS THE COURT OF APPEALS MAJORITY OPINION CONTRARY TO THE PLAIN LANGUAGE OF THE STATUTE?

The trial court did not address this issue.

The Court of Appeals answered, "No".

Plaintiff-Appellee contends that the answer should be, "No".

Defendant-Appellant contends that the answer should be, "Yes".

STATEMENT OF QUESTIONS PRESENTED cont'd

II.A. HAS PLAINTIFF SHOWN GOOD CAUSE WHY HER ATTORNEY OR OTHER REPRESENTATIVE SHOULD BE ALLOWED TO ATTEND THE EXAMINATIONS?

The trial court answered, "Yes".

The Court of Appeals answered, "Yes".

Plaintiff-Appellee contends that the answer should be, "Yes".

Defendant-Appellant contends that the answer should be, "No".

II.B. HAS PLAINTIFF SHOWN GOOD CAUSE FOR ALLOWING AUDIO/VISUAL RECORDING OF THE EXAMINATION?

The trial court answered, "Yes".

The Court of Appeals answered, "Yes".

Plaintiff-Appellee contends that the answer should be, "Yes".

Defendant-Appellant contends that the answer should be, "No".

II.C. EVEN IF MCR 2.311 ALLOWED THE COURT TO IMPOSE CONDITIONS, WILL PRECLUDING THE EXAMINERS FROM ASKING QUESTIONS THEY DEEM NECESSARY TO DETERMINE PLAINTIFF'S CONDITION MATERIALLY AND ADVERSELY AFFECT THE ACCURACY AND CREDIBILITY OF THE EXAMINATION RESULTS?

The trial court answered, "No".

The Court of Appeals answered, "No".

Plaintiff-Appellee contends that the answer should be, "No".

Defendant-Appellant contends that the answer should be, "Yes".

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STATEMENT OF QUESTIONS PRESENTED cont'd

III. IS AN ISSUE FIRST PRESENTED IN A MOTION FOR REHEARING FILED WITHIN THE 21-DAY APPEAL PERIOD PRESERVED FOR APPELLATE REVIEW UNDER THE STANDARD OF REVIEW GENERALLY APPLICABLE TO SUCH ISSUES?

The trial court did not address this issue.

The Court of Appeals answered, "No".

Plaintiff-Appellee presumably will contend that the answer should be, "No".

Defendant-Appellant contends that the answer should be, "Yes".

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STATEMENT OF FACTS

This is a first-party no-fault case. Plaintiff claims, inter alia, a number of psychological and cognitive injuries resulting from an automobile accident. Defendant appeals from orders entered by Hon. Robert Ziolkowski, Wayne County Circuit Court, imposing several conditions on psychological and psychiatric examinations requested by Defendant. The pertinent facts follow.

Plaintiff was involved in an automobile accident on May 15, 2002. (11a). She claims to have sustained a number of injuries, including cognitive, psychological, and emotional damage. (71a). She filed her Complaint on February 11, 2003. (1a).

Plaintiff's attorney refused to allow Plaintiff to undergo examinations by physicians of Defendant's choosing unless Defendant would stipulate to an order imposing a number of conditions which Defendant found unreasonable and objectionable. (14a-15a, ¶3). Accordingly, Defendant filed a Motion To Compel Independent Medical Examinations. (2a, Nos. 24-25).

Judge Ziolkowski acceeded to Plaintiff's requests and on August 25, 2003, entered an order (50a), which imposed, inter alia, the following conditions:

(a) Plaintiff's attorney or other representative will be allowed to attend the examinations (50a, ¶2), with Plaintiff's attorney being allowed to interrupt the examination whenever he feels the examiner is asking improper questions (51a, ¶12).

(b) Plaintiff will be allowed to videotape the examination. (50a, ¶2).

(c) Plaintiff will not be required to provide any information herself as to how she was injured (52a, ¶14), or any medical history which (in the opinion of her attorney) is unrelated to the injuries claimed in this lawsuit (id., ¶15). Information which the examiner requires must be obtained through other forms of discovery (id., ¶16).

On September 12, 2003, Defendant filed a Motion for Rehearing (3a, No. 51; 53a-63a), which Judge Ziolkowski denied in an order entered September 19, 2003 (101a-102a).

On October 10, 2003, Defendant filed an Application for Leave To Appeal to the Court of Appeals. (4a, No. 1). That Court granted the application in an order entered December 29, 2003. (5a, No. 15).

On July 21, 2005, the Court of Appeals, per Judges Thomas Fitzgerald and Michael Smolenski, issued a published opinion (103a-110a) holding: (1) MCL 500.3151 does not confer on a no-fault insurer a substantive right to have a claimant submit to a medical examination (106a); and (2) Judge Ziolkowski did not abuse his discretion in forbidding the neuropsychiatric examiner to obtain an oral history from Plaintiff (110a).

The majority opinion declined to address the first two conditions on the ground that they were first raised in the trial court on rehearing, and that STATE FARM's appellate brief failed to address the standards for rehearings. (109a).

The majority did not address STATE FARM's major argument, which was that a trial court may not impose conditions such as these without a particularized showing that they are warranted by the past conduct of the proposed examiner.

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Hon. Henry Saad dissented. He wrote that §3151 unambiguously entitles a no-fault insurer to an unconditional medical examination of a claimant. (112a). Furthermore, the No-Fault Act itself provides remedies if an insurer abuses its rights under that statute. (112a, n 2). Judge Saad concluded that the majority opinion fails to honor the Legislature's role in creating the rights and remedies contained in the No-Fault Act. (113a).

On August 31, 2005, STATE FARM filed an Application for Leave To Appeal to this Court. (9a, No. 76). On June 2, 2006, this Court entered an order (114a) to schedule argument on whether to grant the application or to take other peremptory action. The Court directed the parties to submit briefs within 56 days of the order addressing:

(1) Whether there is a conflict between MCL 500.3151 and MCR 2.311;

(2) Whether, if there is a conflict, the Court Rule is controlling;

(3) Whether a trial court may impose reasonable conditions as part of the examination process;

(4) Whether a plaintiff must establish misconduct specifically directed at the plaintiff by the examiner before reasonable conditions are imposed; and

(5) Whether the conditions imposed in this case were reasonable.

STATE FARM submits this supplemental brief in accordance with that order.

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INTRODUCTION

As a preface to its discussion of the issues, Defendant will provide some context to the issues presented.

The conditions which Plaintiff requested from Judge Ziolkowski were a preemptive attack, pursuant to a MTLA-prescribed format (115a-121a [attached below to Defendant's Motion for Rehearing]), on Defendant's ability to conduct fair and meaningful discovery. Plaintiffs' attorneys are pushing that tactic (with mixed results)[1] as "a hot issue before every circuit judge" (135a).

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[1]Court of Appeals Judge Donofrio, during his tenure on the circuit court bench, characterized these MTLA-form conditions as an attempt "to obfuscate discovery and obfuscate the truth", as "gamesmanship", and (not to put too fine a point on it) as "garbage". (125a, 126a, 129a).

Judge Robert Colombo characterized having an attorney present as "unreasonable" because it "totally chills the examination". (139a).

On the other hand, jurists such as Judge Ziolkowski -- fueled perhaps by his view of defense lawyers as "reluctant . . . to be honest" and "hid[ing] . . . information" (143a) -- have taken the position that these blanket orders are appropriate (90a).

In the trial court, Plaintiff's attorneys attached ten orders as Exhibit 6 to their Response to Defendant's Motion for Rehearing, which they represented as demonstrating that a number of judges have imposed similar conditions.

There is no apparent consensus among trial judges as to the general propriety of the conditions under discussion. Judges Colombo and Donofrio apparently view these conditions a bit differently than some of the other circuit judges. However, the potential for mischief generated by those who are imposing such conditions militates in favor of this Court's issuing a definitive opinion to end this type of nonsense.

That premeditated obstructionist strategy is contrary to the principles governing discovery and to the pertinent case law. Moreover, in the context of a first-party no-fault action, such conditions are legally unauthorized.

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I. THE TERMS OF MCL 500.3151, WHICH CONFER ON A NO-FAULT CARRIER THE UNCONDITIONED RIGHT TO HAVE A CLAIMANT SUBMIT TO MENTAL AND PHYSICAL EXAMINATIONS, CONFLICTS WITH MCR 2.311(A), WHICH REQUIRES A COURT ORDER WHICH IS AVAILABLE ONLY UPON A SHOWING OF GOOD CAUSE, AND WHICH MANDATES THAT CONDITIONS ON THE EXAMINATION BE SET BY THE COURT. THE STATUTE EMBODIES A PUBLIC POLICY CHOICE BALANCING THE CLAIMANT'S RIGHT TO PRIVACY AGAINST THE SYSTEMIC NEED FOR PROMPT VERIFICATION OF THE VALIDITY OF CLAIMS. THEREFORE, THE STATUTE IS CONTROLLING.[2]

Defendant will first set forth the correct analysis of this issue. In the context thereby provided, it will critique the analytical contortions performed by the Court of Appeals majority in order to reach the result that it did.

Preservation

This issue was presented at the hearing on Defendant's Motion To Compel Independent Medical Examinations (35a) and in Defendant's September 12, 2003, Motion for Rehearing, Issue I. (58a-59a).

Standard of Review

This case involves the interpretation and application of a statute to undisputed facts, which is a question of law subject to this Court's de novo review. Roberts v Mecosta County General Hospital, 466 Mich 57, 62, 642 NW2d 663 (2002); Robertson v DaimlerChrysler Corp, 465 Mich 732, 739, 641 NW2d 567 (2002).

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[2]This issue encompasses the first two questions to which this Court directed the parties in its June 2, 2006, order (114a).

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Discussion

In accord with this Court's June 2, 2006, order, Defendant will discuss separately the two questions implicated in this issue.

A. IN THE CONTEXT OF FIRST-PARTY NO-FAULT LITIGATION, §3151 OF THE NO-FAULT ACT CONFLICTS WITH MCR 2.311(A) BECAUSE THE LATTER IMPOSES A PRECONDITION TO THE UNQUALIFIED RIGHT CONFERRED BY THE STATUTE, AND ALSO MANDATES THAT THE COURT DICTATE THE SCOPE AND CIRCUMSTANCES OF THE EXAMINATION.

The statute on which Defendant premises its right to have Plaintiff examined reads as follows:

> "When the mental or physical condition of a person is material to a claim that has been or may be made for past or future personal protection insurance benefits, the person **shall** submit to mental or physical examinations by physicians. A personal protection insurer may include reasonable provisions in a personal protection insurance policy for mental and physical examination of persons claiming personal protection insurance benefits."

MCL 500.3151 (emphasis added).[3]

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[3]Consistent with the statute, Defendant's policy includes the following provision:

> "The ***person*** making claim also shall:"
>
> * * * *
>
> "(2) Be examined by physicians chosen and paid by us as often as we reasonably may require. A copy of the report will be sent to the ***person*** upon written request. The ***person*** or his legal representative if the ***person*** is dead or unable to act, shall authorize us to obtain all medical reports and records."

(150a [attached below as Exhibit 9 to Plaintiff's Response to Motion for Rehearing (68a-84a)]) (emphasis in original).

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Unambiguous contract language is to be enforced as written. Tryc v Michigan Veterans' Facility, 451 Mich 129, 135-36, 545 NW2d 642 (1996); Rinke v Potrzebowski, 254 Mich App 411, 414, 657 NW2d 169 (2002). The express language of §3151 compels a claimant to submit to a physical and mental examination when requested by the insurer. The text contains no preconditions, nor does it authorize a court to dictate the scope and terms of the examination. It is improper for a court to read into the statute language which it does not contain. Roberts, supra at 63. Therefore, no such preconditions or limitations can be read into the statute.

In contrast, the Court Rule invoked by Plaintiff and enforced by the lower courts reads as follows:

> "**(A) Order for Examination.** When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental or blood examination by a physician (or other appropriate professional) or to produce for examination the person in the party's custody or legal control. **The order may be entered only on motion for good cause** with notice to the person to be examined and to all parties. **The order must specify the** time, place, manner, **conditions, and scope of the examination and the person or persons by whom it is to be made**, and may provide that the attorney for the person to be examined may be present at the examination."

MCR 2.311(A) (emphasis added).

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In terms, that Rule imposes as a precondition that the insurer demonstrate "good cause" for the examination.[4] It also requires the trial court to specify the scope and conditions of the examination.

The degree to which the Court Rule restricts a no-fault insurer's right to an examination is underscored by the official commentary to the Rule:

> "**Orders** directing that a party submit to a physical or mental examination **are not entered routinely on request of a party, nor are the a matter of right**. Rather, the party requesting the examination must move for such an order."
>
> * * * *
>
> "***Good Cause***
>
> "The required showing that 'good cause' exists to support an order for the physical or mental examination of a party will vary case by case. One factor, however, will usually negate such a showing. If the information to be obtained from the physical or mental examination is available from another source, it is generally held that good cause has not been shown."

Longhofer, Michigan Court Rules Practice, §2311.5, p 371-72 (emphasis added).

It is thus beyond question that the Court Rule, which imposes preconditions and restrictions not present in the statute, is in conflict with the statute for purposes of this analysis. McDougall v Schanz, 461 Mich 15, 24-25; 597 NW2d 148 (1999) (Court Rule conflicted with statute because former permitted

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[4]The fact that the "good cause" requirement may be uncontested or that it is routinely found to be satisfied does not obviate the meaning of the plain language of the Rule.

testimony precluded by the latter). See also People v Williams, 475 Mich 245, ___; 716 NW2d 208 (2006) (MCR 6.004[B] invalid because it added triggering event for 180-day rule not found in MCL 780.131).

The remaining question is which provision is controlling.

B. DEFENDANT'S RIGHT TO REQUIRE PLAINTIFF TO UNDERGO AN EXAMINATION IS CONTROLLED BY MCL 500.3151, BECAUSE MCR 2.311(A) CONTRAVENES THE PUBLIC POLICY DECLARED IN THE STATUTE.

The seminal case defining the resolution of conflict between statutes and Court Rules is McDougall, supra. That opinion involved two consolidated medical malpractice cases in which the trial courts ruled that the plaintiffs' experts were not qualified under MCL 600.2169. Id. at 19-20, 23. The plaintiffs challenged the statute on the ground that the testimony was admissible under MRE 702, and that the statute violated this Court's constitutional rule-making authority, Const 1963, art 6, §5, which, in turn, violated separation of powers principles, Const 1963, art 3, §2. 461 Mich at 21, 23.

The McDougall opinion acknowledged this Court's exclusive authority to promulgate rules governing "practice and procedure" in the courts of this State. Id. at 26. However, it also noted that this Court may not promulgate court rules which establish, abrogate, or modify the substantive law. Id. at 27. This Court characterized the dispositive issue as whether §2169 addressed purely procedural matters or substantive law. Id.

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The opinion promulgated the following operative test to determine whether a statute addressed purely procedural matters:

> "We conclude that a statutory rule of evidence violates Const 1963, art 6, §5 only when '"no clear legislative policy reflecting considerations other than judicial dispatch of litigation can be identified ...."' [Citations omitted]. Therefore, '[i]f a particular court rule contravenes a legislatively declared principle of public policy, having as its basis something other than court administration ... the [court] rule should yield.'"

461 Mich at 30-31.

Applying that test, Michigan courts have identified as substantive enactments statutes of limitations, Gladych v New Family Homes, Inc, 468 Mich 594, 600-01; 664 NW2d 705 (2003), the 180-day rule in criminal law, People v Williams, supra at ___, damage caps, Zdrojewski v Murphy, 254 Mich App 50, 82; 657 NW2d 721 (2002), the dead man's evidentiary statute, Electronic Planroom, Inc v McGraw-Hill Companies, Inc, 135 F Supp 2d 805, 816 (ED Mich 2001), and a statute requiring prisoners to disclose the number of prior civil actions they have filed as a precondition to maintaining certain suits, Hawkins v Department of Corrections, Court of Appeals No. 244578 (rel'd 2/3/04; unpublished) (152a).

Against that background, the proper resolution of the issue here under discussion is straightforward. In enacting §3151 of the No-Fault Act, the Legislature afforded no-fault insurers the means to investigate claims for excessiveness or fraud. Clute v General Accident Assurance Company of Canada, 177 Mich App 411, 420, 442 NW2d 689 (1989); Lewis v Aetna Casualty & Surety Co, 109

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Mich App 136, 139, 311 NW2d 317 (1981). In doing so, the Legislature resolved the balance between a claimant's right to privacy (which is the interest protected by the "good cause" requirement of Rule 2.311[A]) and the systemic need for a means of promptly investigating and verifying no-fault claims.

In short, §3151 represents a legislatively declared public policy having as its basis something other than court administration. Indeed, that provision is fully applicable outside the judicial context. Clute, supra; Lewis, supra. As such, the statute is controlling; the Court Rule should yield.

C. THE COURT OF APPEALS MAJORITY OPINION IS CONTRARY TO THE PLAIN LANGUAGE OF THE STATUTE.

The linchpin of the Court of Appeals majority opinion in the instant case is its holding that §3151 confers no substantive right on a no-fault insurer to have an examination of a claimant conducted by a physician of the insurer's choice. (105a, 106a, 108a). From there, the analysis characterizes the issue as one arising solely out of the insurance contract[5] which does not give parties the right to dictate how discovery shall proceed. (108a).

For good measure, the majority then posits that in §3159 of the No-Fault Act, the Legislature conferred authority on trial courts to impose conditions on medical examinations of claimants.

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[5]Nevertheless, the majority opinion expressly recognized that Defendant's position is ultimately premised on the statute, not on the contract. (108a n 7).

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Therefore, the majority reasoned, §3151 does not conflict with MCR 2.311(A). (Id.).

As will be demonstrated below, that analysis is defective at every step.

As noted above, the keystone of the majority's analysis is that §3151 does not convey a right to a medical examination, but only the right to include a policy provision to that effect:

> "Section 3151 refers to a 'mental or physical examination by physicians,' not to an *independent* mental or physical examination by a physician of defendant's choice. The basis of defendant's motion for an *independent* medical examination by a physician of defendant's choice is the following contractual provision in the insurance policy:"
>
> * * * *
>
> "The present case involves a provision in an insurance policy that provides a discovery device to evaluate plaintiff's claim. Defendant did not establish any substantive right under MCL 500.3151 to have a physician of its choice examine plaintiff. Defendant established only a contractual right that can be upheld if it does not contravene the no-fault act."
>
> * * * *
>
> "The Legislature clearly has authorized reasonable provisions for medical examinations in insurance policies. MCL 500.3151. The right to include such reasonable provisions in an insurance policy is a substantive right."

(105a, 106a, 108a) (emphasis in original).

That interpretation of §3151 utterly ignores the first sentence of the statute. The majority opinion expressly acknowledges that the second sentence of that statute encompasses all of the meaning that the majority ascribes to it:

"The second sentence authorizes the insurer to include

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'reasonable provisions' for the examination when the person claims PIP benefits . . . ."

(105a).

However, the majority opinion ascribes absolutely no meaning to the first sentence of §3151. That failure violates well-recognized tenets of statutory construction. A court is to give effect to all of the language of a statute. State Farm Fire & Cas Co v Old Republic Ins Co, 466 Mich 142, 146; 644 NW2d 715 (2002). No portion of a statutory provision is to be ignored or rendered nugatory. Wickens v Oakwood Healthcare System, 465 Mich 53, 60; 631 NW2d 686 (2001).

Analysis of the language which the majority chose to ignore demonstrates beyond question that it conveys on a no-fault insurer the substantive right to a medical examination of a claimant. In the context in which it is used in §3151, the term "submit" denotes acceding to a demand:

> "**sub•mit** . . . *tr.* **1.** to yield or surrender (one's self) to the will or authority of another. . . . *intr.* **1.** to yield to the opinion or authority of another; give in **2.** to allow one's self to be subjected; acquiesce."

American Heritage Dictionary (2d ed) (Houghton Mifflin Co 1985), p 1212.

> "**sub•mit** . . . *v.t.* **1.** to yield (one's self) to the power of another. . . . *v.i.* **4.** to yield one's self to the power of another."

Random House Dictionary (Random House, 1980), p 868.

That meaning is underscored by §3153, which is the provision which sets forth the mechanism for enforcing §3151:

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> "A court may make such orders in regard to the **refusal to comply** with sections 3151 and 3152 as are just, except that an order shall not be entered directing the arrest of a person for **disobeying an order to submit to a physical or mental examination**. The orders that may be made in regard to such a refusal include, but are not limited to:
>
> "(a) an order that the mental or physical condition of **the disobedient person** shall be taken to be established for the purposes of the claim in accordance with the contention of the party obtaining the order.
>
> "(b) an order refusing to allow **the disobedient person** to support or oppose designated claims or defenses, or prohibiting him from introducing evidence of mental or physical condition.
>
> "(c) an order rendering judgment by default against **the disobedient person** as to his entire claim or a designated part of it.
>
> "(d) an order requiring **the disobedient person** to reimburse the insurer for reasonable attorneys' fees and expenses incurred in defense against the claim."

MCL 500.3153 (emphasis added).

The language "refusal to comply" and "disobeying an order", and the repeated references to the claimant as "the disobedient person" necessarily implies a demand from the insurer. The meaning of §3153 is that the courts will enforce that demand. It is thus undeniable that §3151 grants a no-fault insurer a substantive, court enforceable right to demand that a claimant submit to an examination by a physician of the insurer's choice.

At the end of its discussion of this issue, the majority opinion posits that §3159 of the No-Fault Act authorizes courts to impose conditions on medical examinations of claimants.

(108a). That provision (which the opinion pointedly neglects to quote) has nothing to do with medical examinations of claimants.

As was demonstrated above, by its express language §3153 is the mechanism for enforcement of the rights vested in §§3151 and 3152 of the No-Fault Act. Likewise, §3159 is the enforcement mechanism for §3158. The latter statute reads in pertinent part as follows:

> "(1) An employer, when a request is made by a personal protection insurer against whom a claim has been made, shall furnish forthwith . . . a sworn statement of the **earnings** since the time of the accidental bodily injury and for a reasonable period before the injury, of the person upon whose injury the claim is based.
>
> "(2) A physician, hospital, clinic or other medical institution providing, before or after an accidental bodily injury upon which a claim for personal protection insurance benefits is based, any product, service or accommodation in relation to that or any other injury, or in relation to a condition claimed to be connected with that or any other injury, if requested to do so by the insurer against whom the claim has been made, (a) shall furnish forthwith a written report of the **history, condition, treatment and dates and costs of treatment** of the injured person and (b) shall produce forthwith and permit inspection and copying of its records regarding the **history, condition, treatment and dates and costs of treatment**."

MCL 500.3158(1)-(2) (emphasis added).

Section 3159 tracks the underscored language word for word:

> "In a dispute regarding an insurer's right to discovery of facts about an injured person's **earnings** or about his **history, condition, treatment and dates and costs of treatment**, a court may enter an order for the discovery. The order may be made only on motion for good cause shown and upon notice to all persons having an interest, and shall specify the time, place, manner, conditions, and scope of the discovery. A court, in order to protect against annoyance, embar-

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rassment or oppression, as justice requires, may enter an order refusing discovery or specifying conditions of discovery and may order payments of costs and expenses of the proceeding, including reasonable fees for the appearance of attorneys at the proceedings, as justice requires."

MCL 500.3159.

Thus, §3159 governs disputes between a no-fault insurer and an employer or health care provider as to the insurer's right to certain information. Neither the language nor the structure of §3159 will permit the conclusion that it applies to an insurer's statutory right to a medical examination of the claimant under §3151.

In sum, the Court of Appeals majority failed to undertake the analysis required by McDougall, and instead embarked upon a discussion which utterly misinterpreted the plain language of the provisions upon which it relied. For the reasons set forth in Issues I.A.-I.B., supra, it is beyond question that §3151 of the No-Fault Act confers on no-fault insurers the right to have a claimant submit to a medical examination, that the policy authorizes the insurer to choose the examiner, and that the decisions of the lower courts usurped the Legislature's prerogative by failing to enforce that statute.

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II. EVEN IF MCR 2.311(A) COULD PROPERLY BE INVOKED, THE TRIAL COURT ABUSED ITS DISCRETION BY IMPOSING THE CONDITIONS IN QUESTION WITHOUT A PARTICULARIZED SHOWING OF NEED.

In response to the third question in this Court's June 2, 2006, order (114a), Defendant responds that if Rule 2.311(A) governs,[6] a trial court may certainly impose reasonable conditions on the examination process. The express language of the Rule confers that authority on the trial court.

In the following discussion, Defendant will focus on the fourth question in the aforementioned order: Whether a plaintiff must establish some misconduct directed at the plaintiff before conditions may be imposed? Defendant maintains that prior misconduct or bias must be demonstrated, although not necessarily directed at the particular plaintiff to be examined.

As to the final question, Defendant answers that the conditions imposed in the instant case were per se unreasonable because there was no showing whatsoever of any necessity for them.

Although Plaintiff's attorneys characterize the conditions in question as necessary to "protect" Plaintiff from examiner

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[6]As was demonstrated in the previous issue, MCL 500.3151 contains no language which would allow a court to impose conditions on an examination demanded under that provision. If the claimant feels that the fact or nature of the insurer's requests are unreasonable, he is free to refuse and to sue the insurer for no-fault benefits. As Judge Saad pointed out in his dissent (109a-110a), if the insurer's denial of the claim was premised upon an unreasonable demand for an examination, the No-Fault Act contains remedies in the form of no-fault interest, MCL 500.3142(3), and attorney fees, MCL 500.3148(1).

misconduct, they made no showing of any need for such precautions with the examiners designated by Defendant in the instant case. In fact, they admit that they did not even know who the examiners were when they requested the MTLA-prescribed conditions.[7] (Plaintiff-Appellee's Brief on Appeal, p 12-13).

The pertinent case law requires a showing of good cause before prophylactic conditions may be imposed.

> "As a general rule, **there exists a presumption that a physician in a personal injury action will conduct properly a physical examination** of the plaintiff."
>
> * * * *
>
> "Nevertheless, that presumption can be overcome by a physician's **documented, long-history of partiality**."

White v State Farm Mutual Automobile Ins Co, 600 So2d 1, 3 (La App 1996) (emphasis added) (cited by Plaintiff in the Court of Appeals).

> "Second, the trial court should consider evidence that the requested examination might be conducted in an unfair manner. This evidence may include, but should not be limited to: (a) evidence of past physical abuse

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[7]Subsequently, Plaintiff produced a report from another case by one of Defendant's proposed examiners in which he had asked the examinee about the status of her lawsuit. (157a). Plaintiff argued that such inquiries have nothing to do with a proper psychiatric examination.

Unless Plaintiff's attorney has an undisclosed medical degree, he is not qualified to say what is germane to a psychological evaluation in the context of allegedly traumatically induced injuries. The proof of that pudding is that **Plaintiff's neuropsychological consultant specifically asked questions concerning this litigation and the circumstances of the accident**. (165a). It would thus appear from the record that such inquiries are within the scope of a proper psychiatric evaluation. In any event, Defendant maintains that that single item of evidence falls far short of a showing of a history of misconduct.

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of examinees by the examiner; (b) evidence of past misrepresentations by the examiner; (c) evidence that the examiner has financial incentives to consider the examinee as an adversary; and (d) evidence that the examiner's testimony is almost always slanted against the examinee, *e.g.*, by showing that the doctor has seldom if ever found an examinee to be disabled.

> "**The mere fact that the doctor is being compensated should carry little weight** since virtually all CR35.01 examiners are compensated."

Metropolitan Property & Casualty Ins Co v Overstreet, 103 SW3d 31, 40 (Ky 2003) (emphasis added) (cited by Plaintiff in the Court of Appeals).

> "To establish good cause, that party must submit '**a particular and specified demonstration of fact, as distinguished from stereotype and conclusory statements**.'"

Hertenstein v Kimberly Home Health Care, Inc, 189 FRD 620, 624 (D Kan 1999) (emphasis added).

Despite the fact that Defendant emphasized the lack of any showing to justify the conditions imposed, the Court of Appeals declined even to address the issue. Defendant does not contend that an appropriately fashioned protective order is never available. However, Defendant maintains that such an order requires a documented, particularized showing that the specific physician has a long history of demonstrated bias against personal injury claimants. Insisting on conditions without such a showing cannot be justified as necessary to protect a plaintiff. Instead, it is simply a premeditated scheme to undermine a defendant's ability to defend a case.

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The lack of any showing of good cause is common to all three of the conditions to which Defendant objects. To underscore the importance of such a showing, Defendant will discuss the serious problems created by each of the conditions imposed.

Standard of Review

This Court reviews discovery orders for abuse of discretion. Bass v Combs, 238 Mich App 16, 26, 604 NW2d 727 (1999), lv den, 463 Mich 855, 617 NW2d 690 (2000); Traxler v FMC, 227 Mich App 276, 286, 576 NW2d 398 (1998). A trial court abuses its discretion when its ruling lacks either a legal basis or a factual basis in the record. E.g., Alken-Ziegler, Inc v Waterbury Headers Corp, 461 Mich 219, 228-29 n 5, 600 NW2d 638 (1999); Mulholland v DEC International Corp, 432 Mich 395, 411, 443 NW2d 340 (1989). A trial court also abuses its discretion if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. Cleary v The Turning Point, 203 Mich App 208, 210, 512 NW2d 9 (1994); Gore v Rains & Block, 189 Mich App 729, 737, 473 NW2d 813 (1991).

Discussion

A. PLAINTIFF HAS NOT SHOWN GOOD CAUSE WHY HER ATTORNEY OR OTHER REPRESENTATIVE SHOULD BE ALLOWED TO ATTEND THE EXAMINATIONS.

Preservation

This issue was presented in the trial court in Defendant's Motion for Rehearing. (59a-61a).

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Discussion

There is no Michigan case law on point. However, a well-developed body of federal decisions demonstrates that an attorney should virtually never be permitted at a physical or mental examination. Those cases have identified four considerations supporting that conclusion.

First, the presence of an attorney would create an adversarial environment, which is to be avoided in the interest of an effective examination. E.g., Cabana v Forcier, 200 FRD 9, 12 (D Mass 2001); Hertenstein v Kimberly Home Health Care, Inc, supra at 629; Holland v United States, 182 FRD 493, 496 (D SC 1998); Dodd-Anderson v Stevens, 1993 WL 273373 (D Kan 1993) (176a-177a); Wyatt & Bales, The Presence of Third Parties at Rule 35 Examinations (hereinafter "Wyatt"), 71 Temp L Rev 103 (1998).

Second, the presence of an attorney impairs the one-on-one communication necessary for an effective examination. E.g., Cabana, supra at 12; Abduwali v Washington Metro Area Transit Authority, 193 FRD 10, 13 (DDC 2000); Holland, supra at 495; Romano v II Marrow, Inc, 173 FRD 271, 274 (D Ore 1997); Wyatt, supra at 119-20.

Third, it is unfair to allow Plaintiff's attorney to attend the examinations in question where Defendant is not afforded the same opportunity with regard to examinations performed by doctors whom Plaintiff intends to call as witnesses. E.g., Cabana, supra at 12; Holland, supra at 495-96; Wyatt, supra at 118.

Finally, if Plaintiff's attorney attends, he may be disqualified from representing Plaintiff in the case because he may become a material witness. MRPC 3.7. This may occur if Plaintiff's attorney's cross-examination of the physician requires contradicting the physician's testimony on the basis of the attorney's own observations. E.g., Hertenstein, supra at 629; Holland, supra at 495; Dodd-Anderson, supra at 2; Wyatt, supra at 121-22.

Moreover, concerns about the examination becoming a de facto deposition with the examiner asking improper questions can be adequately addressed by less intrusive means. Plaintiff's attorney will have an opportunity to cross-examine the physician at trial, armed with information concerning the examination obtained from Plaintiff, from the physician's report, and from the physician's pre-trial deposition. E.g., Cabana, supra at 12; Abduwali, supra at 14; Wyatt, supra at 125-26. Furthermore, any admissions which the court deems improperly obtained can be excluded at trial. Hertenstein, supra at 629; Dodd-Anderson, supra at 2; Wyatt, supra.

Based on the foregoing, "the overwhelming majority of courts that have considered the issue have denied the examinee's request to have his attorney present during the examination." Wyatt, supra at 110. See also Cabana, supra at 12. An exception is appropriate only if Plaintiff can show "good cause":

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"To establish good cause, that party must submit 'a particular and specified demonstration of fact, as distinguished from stereotyped and conclusory statements.'"

Hertenstein, supra at 624.

The mere fact that the defendant has hired the examiner is not a sufficient showing. Hertenstein, supra at 633; Galieti v State Farm Mutual Automobile Ins Co, 154 FRD 262, 265 (D Colo 1994). The plaintiff must come forward with **evidence** demonstrating that the examiner may engage in impropriety, Hertenstein, supra at 333, or that some other "compelling need" exists, Abduwali, supra at 13; Hertenstein, supra at 634; Wyatt, supra at 129.

B. PLAINTIFF HAS NOT SHOWN GOOD CAUSE FOR ALLOWING AUDIO/VISUAL RECORDING OF THE EXAMINATION.

Preservation

This issue was presented in the trial court in Defendant's Motion for Rehearing. (61a-62a).

Discussion

The same considerations of unnecessary intrusiveness discussed above also apply to the video recording permitted by the August 25 order. One court summarized the problems as follows:

"Clearly, **the presence of a videographer could influence [the plaintiff]**, even unconsciously, **to exaggerate or diminish his reactions** to Dr. Westerkam's physical examination. [Plaintiff] could perceive the videotape as critical to his case **and fail to respond in a forthright manner**. In addition, **the videotape would give Plaintiffs an evidentiary tool unavailable to Defendant, who has not been privy to physical examinations made of Mr. Holland by either his treat-**

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ing physicians or any experts he may have retained. Such a result undermines the purpose of Rule 35."

Holland, supra at 496 (emphasis added). See also Romano, supra at 274 (recording device would constitute a distraction during the examination and diminish the accuracy of the process).

Again, Plaintiff has not shown the existence of compelling circumstances, Holland, supra, which would warrant such an extremely disruptive intrusion into the examining room. As with the presence of counsel, allowing the videotaping of the examination is neither legally nor factually warranted.

C. EVEN IF MCR 2.311 ALLOWED THE COURT TO IMPOSE CONDITIONS, PRECLUDING THE EXAMINERS FROM ASKING QUESTIONS THEY DEEM NECESSARY TO DETERMINE PLAINTIFF'S CONDITION WILL MATERIALLY AND ADVERSELY AFFECT THE ACCURACY AND CREDIBILITY OF THE EXAMINATION RESULTS.

Preservation

This issue was presented in the trial court in Defendant's Motion for Rehearing. (62a-63a).

Discussion

Of all of the conditions imposed by the August 25 order, this one may be the most absurd. The pertinent decisional authority establishes beyond question that obtaining a **complete** history is an integral part of a medical examination, and that there is no adequate substitute for the examiner eliciting it himself from the subject.

> "To restrict a physician from questioning a patient during a physical examination unduly restricts the physician's ability to obtain the information necessary to reach medical conclusions. **The question-**

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> **ing of the plaintiffs by defense counsel during the taking of their depositions, the historical medical records, and the answers of the plaintiffs to interrogatories are no substitute for the answers to questions that a physician must pose to a patient during a physical examination. All of the questions** that a medical doctor needs to ask, in particular the follow-up questions, **cannot be determined in advance** of the medical examination."

Romano, supra at 273 (emphasis added).

> "We agree with these reasons given by the district court which, briefly stated are: (1) a medical history is a necessary and integral part of a medical examination; (2) such a medical history prepared by plaintiff's attorney, or any other person, may not be sufficient for a doctor's purpose in evaluating the patient's physical condition; (3) in order to give his professional opinion the examining doctor must be allowed to elicit his own medical history because, **due to differences in training, experience, and background the author of such a previously prepared medical history may omit facts which are of vital significance to the examining physician**; (4) **no doctor should be required to give his professional diagnosis and opinion** as to a person's physical condition, pursuant to a court order, **without the right to elicit the medical history which he reasonably deems relevant and necessary for that purpose**."

Simon v Castille, 174 So2d 660, 666, app den, 176 So2d 145, cert den, 382 US 932, 86 S Ct 325, 15 L Ed 2d 344 (1965) (emphasis added). See also Krasnow v Bender, 78 Ill 2d 42; 397 NE2d 1381, 1384 (1979). All of the foregoing considerations apply with even more force to psychiatric evaluations.

The Court of Appeals blithely affirmed the imposition of this condition by noting that the examiner is not totally precluded from asking questions about medical history, and that "defendant had access to plaintiff's medical records". (110a & n 9). That analysis is both analytically and factually defective.

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The problem with the condition is not that it totally precludes the doctor from asking medical history questions. It plainly does not. However, it does transfer the power to determine which questions are appropriate from a psychiatrist to the Plaintiff's attorney, who will surely interrupt any questioning which threatens to undermine his case.

As to supposed access to Plaintiff's medical records, the Court of Appeals apparently uncritically adopted that allegation from Plaintiff's brief. The fact is that this 25-year-old Plaintiff spent the first 20 years of her life in **Albania**. (64a). Translation problems aside, simply obtaining those records (if they exist) would be a daunting task.[8]

In sum, the Court of Appeals affirmed the imposition of intrusive conditions designed by the MTLA to impair the ability of defendants to obtain relevant medical information. The propriety of doing so is now enshrined in a published opinion. This Court should not allow it to stand.

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[8]Perhaps Plaintiff's attorneys can be forgiven for this obvious slip. This is, after all, an MTLA-programmed argument intended to hamper discovery in a mass of cases. Defendant does not think that Plaintiff's attorneys intended to mislead the lower courts. It is more likely that they simply forgot to tailor the MTLA template to the particular facts of the case.

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III. AN ISSUE FIRST PRESENTED IN A MOTION FOR REHEARING FILED WITHIN THE 21-DAY APPEAL PERIOD IS PRESERVED FOR APPELLATE REVIEW UNDER THE STANDARD OF REVIEW GENERALLY APPLICABLE TO SUCH ISSUES.

Standard of Review

This Court reviews the interpretation of a Court Rule de novo. Colista v Thomas, 241 Mich App 529, 535; 616 NW2d 249 (2000).

Discussion

The Court of Appeals declined to address the conditions discussed in Issues II.A-B. for the following reason:

> "With regard to the first two conditions, Defendant waived any challenge to the conditions because its attorney agreed to these conditions if the court rule applied. Error requiring reversal must be that of the trial court, and not error to which an aggrieved party contributed by plan or negligence. *Phinney v Verbrugge*, 222 Mich App 513, 537; 564 NW2d 532 (1997). A party waives an issue by affirmatively approving of a trial court's action. *People v Carter*, 462 Mich 1206 [sic], 215-216; 612 NW2d 144 (2000).[8]"
>
> * * * *
>
> "[8]**Although Defendant**, through new counsel, **later challenged the trial court's decision in a motion for rehearing, Defendant's appeal brief fails to address the standards for rehearings. Defendant's failure** to brief this necessary issue **precluded appellate review**. *Roberts & Son Contracting, Inc v North Oakland Development Corp*, 163 Mich App 109, 113; 413 NW2d 744."

(109a & n 8) (emphasis added). The majority cited no authority for the proposition that a failure to address the standards for rehearings precludes appellate review in these circumstances.[9]

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[9]The case cited in the quoted footnote involved an attorney's failure to address on appeal his absence at the hearing in

(continued...)

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Indeed, in light of the procedural history of this case, that holding is rather opaque. In the trial court, Judge Ziolkowski allowed a response to be filed to Defendant's Motion for Rehearing (3a, Nos. 51, 53), conducted a hearing on the motion (85a-100a), and specifically ruled on the merits of the issues presented (97a). In that context, it is difficult to fathom the meaning of the above-quoted passage. The applicable standard of review of the issues presented in the Court of Appeals was set forth at page iv. of Defendant-Appellant's Brief on Appeal.

The opacity of the opinion on that point highlights a perennial problem in the Court of Appeals: The lack of a coherent standard governing the review of issues raised in the trial court on rehearing. Understanding that problem requires an appreciation of the practical function of motions for rehearing.

The pertinent Court Rule reads as follows:

> "Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error."

MCR 2.119(F)(3).

The purpose of that Rule is to provide a procedural device for the prompt correction of plainly erroneous results at the

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[9](...continued)
the trial court, which was the basis of the trial court's ruling in that case. The cited case does not remotely support the proposition for which the majority cites it.

trial court level. Bers v Bers, 161 Mich App 457, 462-63, 411 NW2d 732 (1987). That is consistent with the overall purpose of the Court Rules "to secure the just, speedy, and economical determination of every action". MCR 1.105.

It is worth noting that Rule 2.119(F)(3) expressly contemplates that new issues should be presented, and that the motion should be granted if the new issues or material demonstrate that a wrong result was reached originally. E.g., Blevins v Abraitis, Court of Appeals No. 252947 (rel'd 8/25/05; unpublished) (181a).

Issues presented in a motion for rehearing filed within the original 21-day appeal period are preserved for appellate review regardless whether the trial court rules on them. See Family Independence Agency v Davis, 264 Mich App 66, 71-72, 690 NW2d 287 (2004); Bers, supra at 462-63; Blevins, supra.[10] The applicable

[10]There exists a peculiar exception to that principle in appeals from rulings on summary disposition. Case law from this Court holds that material submitted on rehearing will not be considered by an appellate court in reviewing the propriety of the ruling on the summary disposition motion. Maiden v Rozwood, 461 Mich 109, 126 n 9, 597 NW2d 817 (1999); Quinto v Cross & Peters Co, 451 Mich 358, 366 n 5, 547 NW2d 314 (1996). The rationale for such a rule is not evident given the purpose of a motion for rehearing and the directive to interpret the Court Rules to reach just results.

Not surprisingly, the legal pedigree of the rule is suspect. Maiden cited no authority at all. Quinto cited Apfelblat v National Bank of Wyandotte-Taylor, 158 Mich App 258, 263; 404 NW2d 725 (1987), which held that in ruling on a motion for summary disposition, a trial court is only obliged to consider the then-available evidence. (It is difficult to see how a court could be expected to consider unavailable evidence.) Apfelblat cited Spectrum Manufacturing Corp v Bank of Lansing, 118 Mich App 25, 31, 324 NW2d 523 (1982), which held that a court must consider all material available to it.

Neither Maiden nor Quinto articulate a line of reasoning

(continued...)

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standard of appellate review obviously depends on the nature of the issue. For example, a question of law raised on rehearing is subject to de novo review. Family Independence Agency v Davis, supra, 71-72.

Despite all of that, there are a plethora of cases asserting that denial of a motion for rehearing is reviewed for abuse of discretion. E.g., Ensink v Mecosta County General Hospital, 262 Mich App 518, 540, 687 NW2d 143 (2004); Blevins, supra, 4; Caron v Walmart Stores, Inc, Court of Appeals No. 254915 (rel'd 5/31/05; unpublished) (184a-185a); Family Independence Agency v Wells, Court of Appeals Nos. 247504, 247962 (rel'd 10/28/03; unpublished) (187a); Freund v Silagy, Court of Appeals No. 228974 (rel'd 5/14/02; unpublished) (191a).

The only mention of discretion in Rule 2.119(F)(3) is to the effect that the trial court has discretion to revisit the same issues already presented if it so chooses. The Rule cannot rationally be construed to impart discretion to affirm a previous decision in the face of a new issue or material demonstrating that the wrong result was reached.

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[10](...continued)
connecting those principles with the conclusion that an appellate court should ignore material produced on rehearing which demonstrates that a wrong result was reached. Affirming a demonstrably erroneous result where the error was promptly brought to the attention of the trial court appears to serve no legitimate systemic purpose.

This particular anomaly is not applicable in the instant case. Defendant presents it here only to underscore the apparent lack of rationality and consistency of the law in this area.

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There is also authority for the paradoxical proposition that a trial court does not abuse its discretion in denying a motion for rehearing if the newly presented issues or facts could have been presented prior to entry of the original order. Charbeneau v Wayne County General Hospital, 158 Mich App 730, 733, 405 NW2d 151 (1987); Bertling v Allstate Ins Co, Court of Appeals No. 198952 (rel'd 3/3/98; unpublished) (194a). That rule has no basis in the language of Rule 2.119(F)(3), nor is it consistent with the evident purpose of that rule.

The instant case illustrates the mischief that can be wrought because of the lack of a reasoned, coherent statement from this Court on the status of issues raised for the first time on rehearing. Rather than reviewing the issues, the majority in the instant case simply declined to address them because Defendant's brief "fails to address the standards for rehearing" -- whatever that means in this context.

The remedy is for this Court to hold that:

(1) Issues presented in motions for rehearing filed within the original 21-day appeal period are preserved for appellate review under the standards generally applicable to the issues in questions; and

(2) A trial court has no discretion to affirm a result which is demonstrably legally or factually erroneous.

RELIEF

WHEREFORE, Defendant-Appellant, prays that this Honorable Court vacate Judge Ziolkowski's August 25, 2003, order and remand this case with instructions that the examinations sought by Defendant shall proceed accordingly.

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Dated: July 26, 2006

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STATE OF MICHIGAN
IN THE SUPREME COURT

ANILA MUCI,	Supreme Court No. 129388
Plaintiff-Appellee,	Court of Appeals No. 251438
v	Wayne County Circuit Court No. 03-304534-NF
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a foreign corporation,	
Defendant-Appellant. /	

PROOF OF SERVICE

STATE OF MICHIGAN)
)ss
COUNTY OF WAYNE)

KATHY JOZSA, being first duly sworn, deposes and says that on the 26th day of July, 2006, she did serve a copy of **DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF and this PROOF OF SERVICE** upon: **DANIEL L. BUCKFIRE, ESQ./THOMAS N. ECONOMY, ESQ. (Attorneys for Plaintiff-Appellee), 17117 West Nine Mile Road, Suite 535, Southfield, MI 48075 and RAYMOND W. MORGANTI, ESQ. (Attorney for Amicus Curiae MDTC), P.O. Box 5068, Southfield, MI 48086,** by mailing same to said attorneys in a sealed envelope, properly addressed, with first class postage prepaid thereon, and by depositing same in the United States Mail at Detroit, Michigan.

Kathy Jozsa
KATHY JOZSA

Subscribed and sworn to before me this 26th day of July, 2006.

Barbara A Lamb
Notary Public: BARBARA A. LAMB
Macomb County, Michigan
My Commission Expires: 6/22/10
Acting in Wayne County

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